

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-1118

United States of America,

Appellee,

v.

Chad Gerard Fouquette,

Appellant.

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* Appeal from the United States

* District Court for the

* District of Minnesota.

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* [UNPUBLISHED]

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Submitted: January 4, 2000

Filed: January 14, 2000

Before BOWMAN, FAGG, and MURPHY, Circuit Judges.

PER CURIAM.

Chad Gerard Fouquette pleaded guilty to assault with a dangerous weapon in violation of 18 U.S.C. § 113(a)(3) (Supp. IV 1998). At sentencing, the District Court¹ denied Fouquette's motion for a downward departure under U.S. Sentencing Guidelines Manual § 5K2.13, p.s. (Nov. 1998), for diminished mental capacity and sentenced him to 33 months imprisonment and 3 years supervised release. Fouquette appeals, and we affirm.

¹The Honorable DAVID S. DOTY, United States District Judge for the District of Minnesota.

We conclude Fouquette's argument that the District Court applied the pre-1998 version of section 5K2.13 is meritless, as the sentencing transcript reflects the Court quoted the pertinent portion of section 5K2.13 as it appeared in its amended form effective November 1, 1998. Fouquette also argues the District Court erroneously denied the diminished-capacity departure without considering the facts or circumstances of his offense or whether he presented a danger to the community at the time of his sentencing. Considering the District Court's comments as a whole, see United States v. Knight, 96 F.3d 307, 311 (8th Cir. 1996), cert. denied, 520 U.S. 1180 (1997), we conclude that the court was aware of its authority to depart for diminished capacity and that the court's exercise of discretion not to depart under the circumstances is unreviewable, see United States v. Jones, 145 F.3d 959, 965 (8th Cir.), cert. denied, 525 U.S. 988 (1998).

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.